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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 560.

CITY OF CHATTANOOGA, TENNESSEE, *et al.*,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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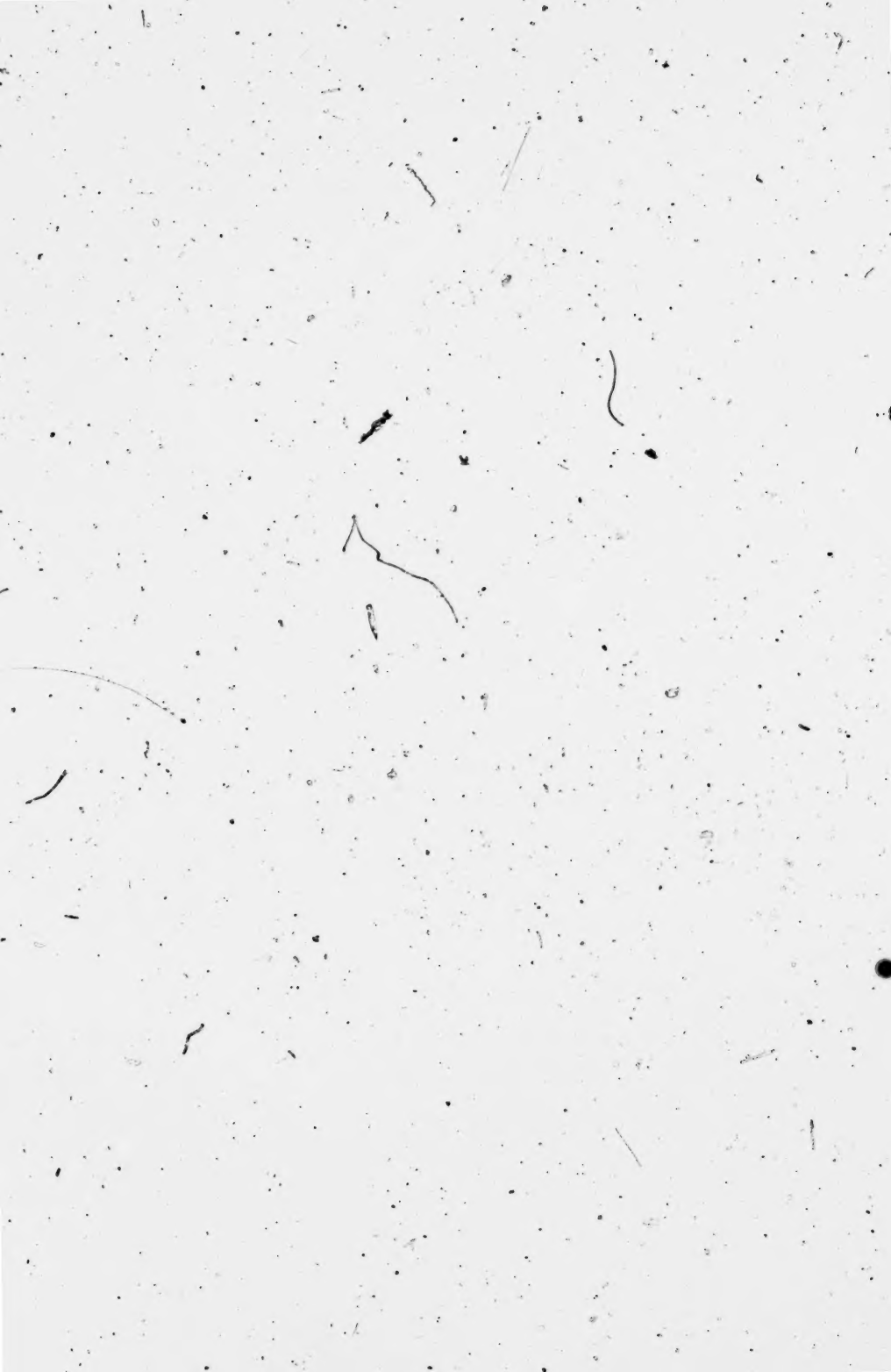

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

May It Please the Court:

The respondent, Louisville and Nashville Railroad Company, respectfully submits under Rule 24 of the Rules of the Supreme Court of the United States, this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

QUESTION PRESENTED.

Whether the City of Chattanooga, Tennessee, and the public for which it acts have acquired an interest in a locomotive known as the "General" such as would entitle it to a judgment requiring that the "General" be maintained as a historical monument, in Chattanooga, Tennessee, in perpetuity.

CONSTITUTIONAL PROVISIONS INVOLVED.

There are no Constitution questions presented.

STATEMENT.

The District Court in its opinion (Petition, App. pp. A4-A27) gave an extremely precise summary of the historical events involving the "General." In addition, the opinion correctly summarized all the factual matters presented to the District Court. The United States Court of Appeals for the Sixth Circuit adopted the District Court's opinion in its entirety when it affirmed the decision.

The undisputed facts are that by leases dated July 19, 1890 and May 11, 1917, the Respondent's predecessor obtained the property of the Western and Atlantic Railroad from the State of Georgia. Included in the rolling stock of the Western and Atlantic Railroad covered by the aforesaid leases was the Civil War locomotive named the "General." During the period from 1891 (or perhaps 1901) to 1961, the Respondent and its predecessor (except for minor intervals) kept the "General" on its private property at its Union Station located in Chattanooga, Tennessee, where it was displayed to persons in the said station from behind a fenced enclosure. At all times since its acquisition under the 1890 lease, the "General" has been under the exclusive custody and control of the Respondent or its predecessor. The entire upkeep and maintenance of the "General" has been furnished by the Respondent or its predecessor since 1890 (pp. 29-33, *infra*). The Petitioners, by their own admission, have never at any time made any contributions by cash or otherwise for the support, maintenance or display of the "General" (p. 21, *infra*).

The former mayor of Chattanooga, P. R. Olgiati, who held office in the City government as a commissioner and

mayor from 1946-1963, testified that he never knew of any claim made by the City of Chattanooga that was adverse to the ownership or control of the "General" by the Respondent or its predecessor or that the City of Chattanooga ever made any claim that the "General" did not belong to the Respondent or its predecessor (pp. 27-28, *infra*).

The Respondent's predecessor, beginning in approximately 1907, made available for distribution certain advertising and public service pamphlets and brochures in which the "General" was depicted and the story of its Civil War episodes was told. From time to time thereafter the Respondent's predecessor redistributed these pamphlets and brochures. Several of these pamphlets, but not all, contain statements to the effect that the "permanent" resting place of the "General" is in the Respondent's Union Station at Chattanooga, Tennessee, where it "can be seen at any time by travelers passing through Chattanooga over the railway." The literature made available by the Respondent's predecessor did not contain any statements whatsoever that the "General" was being donated to, or being placed "in trust" for, the City of Chattanooga and its citizens. The statements contained in the pamphlets and brochures merely related that the "General" was being "permanently" placed by the railroad in its own station, and that it could be seen by those persons traveling on the railroad who came through the Union Station.

In their combined answers to Respondent's interrogatories (pp. 12-25, *infra*), the Petitioners admitted that the statements made in the advertising and public service pamphlets and brochures do not constitute the basis of an express trust or an express contract. When this lawsuit was initially commenced, however, the Petitioners in their complaint had contended that these statements, and these

statements alone, somehow formed the basis of a trust implied by law, a charitable trust, a contract implied by law, or even a dedication, to the City of Chattanooga. The only other theory advanced by the Petitioners in their complaint was one of estoppel, in that they contended that because of the statements in the pamphlets, and because the City of Chattanooga treated the "General" with veneration and respect, the Respondent was estopped from removing the "General" from its own property at the Union Station in Chattanooga, or from making any disposition of the "General" whatsoever.

These theories of the Petitioners were submitted to the District Court under motions for summary judgment filed by the Petitioners and the Respondent. The evidence before the District Court consisted of the aforesaid statements contained in the pamphlets, two old newspaper articles paraphrasing the statements set out in the pamphlets, the Petitioners' answers to interrogatories, and affidavits submitted by the Respondent. The Petitioners and Respondent stipulated that there was no other evidence to be presented. District Judge Frank Wilson entered an opinion and order granting summary judgment for Respondent and denying in all respects the Petitioners' motion.

The Petitioners filed a motion for a new trial, and in support thereof submitted to the Court several additional newspaper articles. The newspapers presented no new evidence, except to suggest that the "General" might have first been placed in Chattanooga in 1901 rather than in 1891. The Petitioners also made a request that they be allowed to search the records of the Respondent to determine if any further evidence existed. The Respondent filed an affidavit from one of its officials stating that it had no other materials or information whatsoever concerning

the "General" other than those already given to the Petitioners and to the Court (pp. 34-35, *infra*). Judge Wilson overruled the motion for a new trial, holding that the proposed "new" evidence submitted by the Petitioners was not in fact any different from that which he had already considered.

The Petitioners appealed this decision to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the District Court.

ARGUMENT.

The factors to be taken into consideration upon a petition for writ of certiorari are set out or indicated in Rule 19 of this Court. It is respectfully insisted by the Respondent that none of the compelling reasons set forth or adverted to in Rule 19 applies in the case at bar. The opinions of the District Court and the Court of Appeals for the Sixth Circuit correctly construed the facts in relationship to the applicable law. The prevailing decisions controlling these opinions are not in conflict. There are no violations of any constitutional guarantees.

In the District Court and on appeal to the Court of Appeals, the sole issue was whether or not the Petitioners had acquired any interest in the "General" which would entitle them to a judgment requiring that the "General" be maintained by the Respondent as a historical monument in Chattanooga, Tennessee, in perpetuity. The Petitioners, by their pleadings, presented theories involving prescription, implied contract, estoppel and a charitable trust, but as the District Court stated in its opinion (Petition, App., p. A18), Petitioners omitted any reference to the first three theories in their brief and argument to the District Court, confining their attention to the charitable-trust theory. That is the only theory open to the Peti-

tioners in this Court, and their fourth Question, which hints at estoppel, cannot properly be considered here.

Blair v. Oesterlein Machine Company, 275 U.S. 220 at 225, 48 S. Ct. 87, 72 L. Ed. 249 (1927).

I.

THE DECISION BELOW IS CLEARLY CORRECT.

The District Court, affirmed by the Court of Appeals, held that the evidence would not support the conclusion that a charitable trust existed. It gave two reasons. One was (Petition, App. p. A23) that before a charitable trust may be found to exist, there must be a reasonably certain expression of a donative trust intent (*Ratto v. Nashville Trust Co.*, 178 Tenn. 457, 159 S.W.2d 88, 141 A.L.R. 341 (1942). The District Court specifically found that the evidence failed to establish such an intent on the part of the Respondent or its predecessor, and it stated at length the reasons for its finding in this regard (Petition, App. p. A24). Clearly, this determination by the District Court is not reviewable here. *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 93 L. Ed. 672 (1949); *Berenyi v. Immigration Service*, 385 U.S. 630, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967).

The second reason given by the District Court was that even assuming that a valid charitable trust was created in favor of the City of Chattanooga and its citizens, under the law of Tennessee that trust would have been subject to relocation at any time (*Southwestern Presbyterian University v. Clarksville*, 149 Tenn. 256, 259 S.W. 550 (1923)). The District Court pointed out that in the *Southwestern* case the contention was that a charitable trust existed which required the location of the university at Clarksville in perpetuity; but the Supreme Court of Tennessee held that the university could be relocated and that the words in its charter and in some conveyances de-

scribing the university as being "permanently" located in Clarksville did not prevent such relocation. The District Court quoted the following language of the Tennessee Supreme Court (Petition, App., p. A209):

> "* * * In this connection it may be remarked that the use of the words 'permanently located' in the third paragraph is not inconsistent with this conclusion. 'Permanent' is not synonymous with 'perpetual.' It is used in contrast with temporary—as a permanent residence, rather than a transient, or a permanent road, rather than a makeshift—but in ordinary acceptation it does not convey the idea of never changing. One adopts a permanent location, or occupation, meaning only that the adoption is made without present contemplation of change, but subject always to exigencies or inducements of circumstances which may arise. The words 'permanently located' used in a conveyance of land to an incorporated institution were construed by the supreme court of the United States in an early case not to mean perpetually. Mead v. Ballard, 7 Wall. 290, L. Ed. 190. Id. at 266-267."

The decision below, as affirmed by the Court of Appeals, is correct. It is in conformity with applicable Tennessee law, as will next be shown.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE TENNESSEE LAW.

In their question number 3, the Petitioners are claiming that the District Court and the Court of Appeals erred in holding that the decision of the Tennessee Supreme Court in *Southwestern Presbyterian University v. Clarksville*, *supra*, stood for the proposition that a trustee not incorporated under Tennessee's charitable corporation laws, and not possessed of any powers to sell, remove or transfer, may transfer trust property to another state

without prior court approval. The Petitioners claim that this holding was in conflict with other Tennessee decisions. The Petitioners are incorrect.

The Petitioners assert that the cases of *Munsey v. Russell Brothers*, 31 Tenn. App. 187, 213 S.W.2d 286 (1948) and *Ward v. Crisp*, 189 Tenn. 513, 226 S.W.2d 273 (1949), stand for the proposition that the right to relocate the trust *res* does not exist under Tennessee law without court approval, and that any attempt by the trustee to relocate property will be set aside at the request of the beneficiaries. This is not the holding of these cases.

In the *Munsey* case, the trust instrument conveyed realty in trust for the specific use of a high school. In the *Ward* case, the trust instrument conveyed realty in trust for the specific use of a church. In each case the trustees attempted to *sell* the trust property to someone other than the beneficiaries of the trust. The cases are authority, therefore, for the proposition that a trustee may not *sell* the property for which the trust was established, for to do so would destroy the purpose of the trust. These cases are not in any way conflicting with the *Southwestern Presbyterian University v. Clarksville* case, which did not involve a sale, but rather a relocation of the trust property.

The only other decision which the Petitioners argue conflicts with the *Southwestern Presbyterian University v. Clarksville* case is the case of *Hascall v. Madison University*, 8 Barb. (N.Y.) 175. This argument is also unmeritorious. First, the *Hascall* decision is not a Tennessee case but rather is one decided by the New York Courts. Thus, there is no conflict among any Tennessee cases. Secondly, the *Hascall* case was not adopted by the Tennessee Supreme Court in the *Southwestern Presbyterian University v. Clarksville* case, but rather was being commented upon since it was cited by the losing party in its brief.

It is clear, therefore, that there is no conflict among any Tennessee cases as contended by the Petitioners, and as to their Question No. 3 the petition for writ of certiorari should be denied.

III.

THERE IS NO QUESTION OF DUE PROCESS.

In their Question No. 1, the Petitioners seek to have this Court grant certiorari on the ground that the Due Process Clause of the Constitution was violated by the refusal of the District Court to reopen the proof and to allow the Petitioners to take further discovery of the Respondent and to search its records. There is no basis whatsoever for this contention.

From the outset, it should be noted that this claim of denial of due process was not assigned as error by the Petitioners in their appeal to the Court of Appeals for the Sixth Circuit. Ordinarily of course the Supreme Court does not decide questions which the Petitioners did not raise in the Court of Appeals. *Sozinskey v. U. S.*, 300 U.S. 506, 57 S. Ct. 554, 81 L. Ed. 772 (1937); *Owens v. Union Pac. R. Co.*, 319 U.S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683 (1943).

The case was decided by the District Court upon motions for summary judgment filed by the Petitioners and by the Respondent. Following the oral arguments on the motions and upon the submission of the motions to District Judge Wilson for his opinion, the Petitioners stipulated that all the evidence concerning the "General" was before the Court. Judge Wilson rendered his decision in favor of the Respondent. Upon obtaining this decision adverse to their theories, the Petitioners, pursuant to Rule 59 of the Federal Rules of Civil Procedure, filed a motion for a new trial and submitted as their ground "newly discovered evidence."

In their motion the Petitioners also requested that they be allowed to take further discovery from the Respondent. The Petitioners, in support of their motion for a new trial, filed an affidavit signed by one of their attorneys. The affidavit quoted from some old newspaper articles which suggested that the "General" might have first been placed in Chattanooga in 1901, rather than in 1891 as the evidence previously had shown. This was extent of the "newly discovered evidence." All other "evidence" set out in the Petitioners' affidavit was either identical or cumulative to the evidence previously considered by the Court. In opposition to the motion for a new trial, the Respondent filed an affidavit which related that it had no other documents of any kind concerning the "General" other than those already considered by the Court on the motions for summary judgment.

The District Court overruled the motion for new trial, holding that the "newly discovered evidence" was only collateral to the issues in the case and would not lead to a different decision than the one given on the motions for summary judgment. The Court of Appeals affirmed this decision.

The grant or denial of a motion for a new trial, under Rule 59 of the Federal Rules of Civil Procedure, on the ground of newly discovered evidence rests within the discretion of the trial court and will be reviewed only for a clear abuse of discretion. *Campbell v. American Foreign Steamship Co.*, 116 F.2d 926, cert. den. 313 U.S. 573, 61 S. Ct. 959, 85 L. Ed. 1530 (1940); *Harris v. Whiteman*, 243 F.2d 563 (1957); *Thomas v. Nuss*, 353 F.2d 257 (1965); 6A *Moore's Federal Practice*, § 59.08[3], p. 3784.

A new trial is not warranted unless the evidence, if it had been presented at the former trial, would probably have produced a different result. *Chicago & Western*

Indiana R. Co. v. Chicago & Eastern R. Co., 140 F.2d 130, cert. den. 322 U.S. 747, 64 S. Ct. 1157, 88 L. Ed. 1579 (1944); *English v. Mattson*, 214 F.2d 406 (1954); 6A *Moore's Federal Practice*, § 59.08[3], p. 3788.

And evidence that is merely cumulative will not warrant a new trial. *Camp v. United States*, 16 F.2d 370, cert. den. 274 U.S. 754, 47 S. Ct. 766, 71 L. Ed. 1333 (1927); *Old Dominion Stages v. Cates*, 65 F.2d 258, cert. den. 290 U.S. 687, 54 S. Ct. 123, 78 L. Ed. 592 (1933); *Roberts v. Sawyer*, 252 F.2d 286 (1958).

Moreover, there is no denial of due process when the court disallows further discovery on a motion for new trial based upon the ground of newly discovered evidence, when the evidence offered presents a collateral issue which is remote to the primary issues in the case. *U. S. v. Mentesana*, 305 F.2d 214, cert. den. 375 U.S. 834, 84 S. Ct. 102, 11 L. Ed. 2d 75 (1962).

It is clear in this case that the District Court did not abuse his discretion in refusing to grant a new trial. There was, therefore, no denial of due process in this case.

CONCLUSION.

For the foregoing reasons, the Respondent respectfully submits that the petition for writ of certiorari should be denied.

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APPENDIX.

COMBINED ANSWERS OF ALL PLAINTIFFS TO INTERROGATORIES PROPOUNDED BY DEFENDANT ON SEPTEMBER 4, 1968.

(Filed September 30, 1968.)

The City of Chattanooga, by and through its Mayor, The Honorable Ralph Kelley, and the individual intervening plaintiffs answer the interrogatories propounded to them by defendant on September 4, 1968, as follows:

* * * * *

2.

Do you claim to be a beneficiary, or claim to represent a beneficiary, of any trust of any nature whatsoever regarding the Civil War locomotive "General"?

Yes.

A. The date such trust was created;

Prior to 1910.

B. The name, address and telephone number of the creator (settlor) of such trust and, if not a natural person, state also;

The Nashville, Chattanooga & St. Louis Railway now merged into defendant.

a.) The name, title, address and telephone number of the person acting on behalf of the settlor in creating such trust;

Unknown to plaintiffs other than railroad officials identified in the list of documents submitted to defendant on or about September 10, 1968, by plaintiffs.

C. The name(s) of the beneficiary(ies) specifically designated by or in such trust;

There was no written trust. The acts of the Nashville, Chattanooga & St. Louis Railway described in the

amended complaint gave rise to a trust as a matter of law in favor of the City of Chattanooga and the public of the Chattanooga community of which the individual intervening plaintiffs are a part, requiring that the engine "General" remain permanently at Chattanooga as a monument to the valor of the past.

D. A verbatim account of the description of the class or classes of persons named as beneficiaries by or in such trust agreement;

See answer to question 2.C.

E. The duration of the trust;

Perpetual.

F. The description of the trust *res* contemplated by the agreement;

There is no trust agreement other than that imposed by operation of law, the trust *res* being the engine "General."

G. The location of the trust *res* contemplated by the agreement;

Chattanooga, Tennessee.

H. The provisions of the trust agreement regarding the continued maintenance of the trust *res*;

There was no trust agreement and if the defendant is unwilling to continue to maintain the "General" as it has been done in the past for the benefit of the City of Chattanooga and the public of the community, the plaintiff, The City of Chattanooga, is willing to undertake this obligation so that the purpose of the trust will not fail.

I. The provisions of the trust agreement as to compensation of the trustee;

There is no trust agreement. The defendant railroad and its predecessor, the Nashville, Chattanooga & St. Louis Railway, became trustees without compensation in

the eyes of the law for the benefit of the public insofar as the "General" was concerned by reason of the voluntary dedication of said engine to the public. The City of Chattanooga is willing to release the defendant of all responsibility for the "General" and all expense as to its maintenance, care and upkeep. No specific provision for compensation of the fiduciary exists other than such as the law may provide to prevent failure of the trust.

J. The name, title and address of the person designated as trustee by or in such trust agreement;

See answer to I.

K. The provisions of the trust agreement as to successor trustee;

See answer to I. The law will not permit the trust to fail by reason of any failure to name a specific trustee or a successor trustee.

L. The name, address and telephone number of the legal custodian of the document or other writing containing the trust agreement;

There is no trust agreement, other than that implied by operation of law from writings of the type attached to plaintiffs' list of documents submitted to defendant, dated September 10, 1968, and other similar documents published by the Nashville, Chattanooga & St. Louis Railway and/or the defendant railroad in great quantity and disseminated to the public.

* * * * * *

O. The names, addresses, and telephone numbers of any persons whom you believe to have been witnesses to the creation of the trust agreement;

All railroad personnel who had responsibility for authorizing, publishing and/or distributing to the public documents of the type listed in plaintiffs' list of documents

submitted to the defendant on or about September 10, 1968, their identity being unknown to plaintiffs other than as named in said documents, many of which parties are believed to be dead due to the great lapse of time involved.

P. The name, address and telephone number of the legal custodian of any document, instrument or writing of any nature whatever showing, or tending to show the existence of any trust agreement relating to the "General," stating as to each person so named; etc.

See documents and information described in plaintiffs' list of documents submitted to defendant on September 10, 1968. Other documents of a similar nature are undoubtedly in existence and defendant is being requested by plaintiffs to produce any and all such similar documents in its possession or under its control. So far as plaintiffs have been able to ascertain in the absence of answers to interrogatories being submitted to defendant the basic documents in question relied upon by plaintiffs as establishing the trust specified in the amended complaint were all published by the railroad for wide distribution to the public as a means of gaining favor with the City of Chattanooga and the public of the community thereby enhancing the commercial success of the railroad.

Q. Describe with particularity any action taken by an official of the Louisville and Nashville Railroad, the Nashville, Chattanooga and St. Louis Railroad, the Western and Atlantic Railroad or the State of Georgia, by which action the City of Chattanooga, its citizens or any other group claiming to be a beneficiary under a trust involving the "General", was assured that the "General" would be returned to Chattanooga, Tennessee, to remain there perpetually, following its removal from such City on or about June 6, 1961.

Until plaintiffs have received answers from the defendant to interrogatories being propounded to it, plaintiffs rely upon newspaper articles appearing in the *Chattanooga News-Free Press* on June 8, 1961, and the *Chattanooga Times* on June 9, 1961, through which Mayor P. R. Olgiati of the City of Chattanooga announced to the public of the community as follows:

Chattanooga News-Free Press, June 8, 1961:

"I have been in touch this morning with top officials of the Louisville & Nashville Railroad in Louisville, Kentucky, where 'The General' has been taken for repairs and reconditioning work."

"L & N Officials have assured me that the 'General's' status as a permanent resident of the City of Chattanooga has not been changed."

Chattanooga Times, June 9, 1961:

"The Mayor said that he had been in touch with top officials of the L & N and that they had assured him that the engine would be returned to become a permanent resident of the City when repairs are completed and the use of the engine in connection with the centennial is over."

The *Chattanooga Times* also stated in an article on June 9, 1961, that Warren A. McNeill, Director of Public Relations for the L & N:

"revealed late Thursday that the 'General' is due for a two-year traveling display as a part of the war centennial. After that, McNeill said, the locomotive will be returned to its home in Chattanooga."

R. Each and every action you may have taken as a beneficiary or, as a representative of a beneficiary, or a trust concerning the "General", by which action you notified in any manner whatever, any official of the Louisville and Nashville Railroad, the Nashville, Chattanooga and St. Louis Railroad, the

Western and Atlantic Railroad, or the State of Georgia of any claim of an interest in or to the "General", or by which you protested any action of the Louisville and Nashville Railroad, the Western and Atlantic Railroad, the State of Georgia, or any of their officials, taken with regard to the "General".

The filing of the subject lawsuit, the amended bill and related pleadings.

S. The names, addresses and telephone numbers of any persons whom you believe to have notified any official of the Louisville and Nashville Railroad, the Nashville, Chattanooga and St. Louis Railroad, the Western and Atlantic Railroad, or the State of Georgia, of any claim of interest in or to the "General", or to have protested any action of the Louisville and Nashville Railroad, the Western and Atlantic Railroad, the State of Georgia, or any of their officials with regard to the "General".

According to the public newspapers the Georgia Legislature on March 14, 1939, sought the removal of the engine "General" from the Union Station in Chattanooga to Kennesaw Mountain, Georgia. At that time officials of the Nashville, Chattanooga & St. Louis Railway are reported as saying "it belongs to us and we won't give it up." The newspapers of the time indicate that the Chattanooga Chamber of Commerce took up the fight with its then President, Emmett Newton, stating that he would wire a "vigorous" protest to Governor E. D. Rivers of Georgia against any plan to move the "General" from its place in the Union Station in Chattanooga. The *Chattanooga News-Free Press* of March 14, 1939, indicates that the public of the community of Chattanooga was up in arms as to the effort of the Georgia Legislature to obtain the engine "General" and remove it to the State of Georgia.

Numerous public spirited citizens were quoted as being in opposition. The *Chattanooga Times*, Wednesday, March 15, 1939, contained a similar account, including quotes in opposition from the representatives of the railroad, the Chamber of Commerce and the City of Chattanooga.

The *Chattanooga News-Free Press* of Sunday, April 12, 1942, looked back upon the controversy in 1939 and commented as to Georgia's effort to obtain the engine at that time.

> "Chattanoogans rebelled against such a step with all the fiery zeal of their southern ancestors. 'The "General" belongs here—right in the Union Station' they cried. And here it stayed."

The controversy again arose in 1959. According to the *Chattanooga News-Free Press* of March 9, 1959, Georgia had planned to take the locomotive to Stone Mountain to be housed there in a museum. Mayor P. R. Olgiati was on record as saying he would do "everything I can to see that it stays here. We feel that since it has been here in Chattanooga so long that it is just a part of Chattanooga," said the Mayor.

County Judge Wilkes T. Thrasher was also quoted in the newspapers along with other prominent citizens as expressing opposition.

Ed Garland, Executive Director of the Chattanooga Chamber of Commerce said at the time that the Chamber "will initiate a move to do everything that we can to keep the 'General' here. We don't intend for it to leave Chattanooga."

The Chattanooga Convention and Visitors Bureau passed a resolution urging that the "General" remain in Chattanooga stating that the locomotive was "purchased by the blood of Andrews and his Raiders, who are buried in the National Cemetery for all time".

Further on or about March 10, 1959, the *Chattanooga Times* reported that a mass meeting was being organized by the American Legion in protest of the removal of the engine from the community and that Senator Ben Cash was preparing a resolution to be introduced in the Tennessee State Senate protesting the removal.

Also according to the *Chattanooga Times* of March 10, 1959, Senator Estes Kefauver was quoted as saying he would do all he could to keep the "General" in Chattanooga.

Architect Mario Bianculli had drawn plans for a display site for the "General" in Patten Parkway and consideration was being given by the American Legion to a public campaign to raise funds to build the display site.

According to the *Chattanooga Times* of March 13, 1959, John Tilford, President of the L & N Railroad, while in Chattanooga, attended a protest meeting in the Union Station at the then site of the engine "General" and stated to the citizens of the community present that he saw "no reason why it (The General) shouldn't stay here". He was also quoted in a *Chattanooga News-Free Press* account of the same meeting as having stated to the protesting group that the length of time that the "General" had been in Chattahooga "justifies Chattanooga's request that it stay here."

The VFW was also quoted at the time as calling upon its organization's 25,000 members in Tennessee "to join us in this noble crusade" to keep the "General" in Chattanooga.

According to the *Chattanooga Times* of March 15, 1959, John A. Chambliss, Chattanooga attorney, appeared in a public telecast on Channel 2 in Atlanta on which he debated the issue of the retention of the "General" in

Chattanooga with Matt McWhorter, Georgia Public Service Commissioner.

On March 18, 1959, the United Daughters of the Confederacy issued a statement setting forth facts "which we feel would justify keeping the 'General' with us," as set forth in the *Chattanooga News-Free Press* on March 18, 1959.

According to the *Chattanooga Times* of July 7, 1959, William H. Kendall, then L & N President, advised the Stone Mountain Memorial Association and the Big Shanty Historical Society, Georgia Groups seeking the return of the "General" to themselves respectively in Georgia, that the railroad would not give up possession, stating that the locomotive was of value to the railroad "in a historic sense and for advertising purposes" and that "we do not believe that it would be to the best interest of the railroad at this time to surrender possession of this most interesting old engine".

On or about July 23, 1959, Attorney General Eugene Cooke of the State of Georgia gave an official opinion to the Governor of the State of Georgia advising him that the Louisville & Nashville Railroad could acquire full title to the engine "General" in 1969, if it chose to under the terms of the existing lease contract, whether the State of Georgia through its Legislature agreed or not.

In addition to the foregoing there was wide protest by the citizens of the community at the time of the surreptitious removal of the engine "General" from the Union Station in Chattanooga by the defendant in 1961 at which time defendant gave the assurances specified in answer to question 2Q above.

T. The names, addresses and telephone numbers of any persons whom you have employed or retained to aid you in any manner whatever regarding your

claim of a beneficial or other interest in the "General".

Counsel of record for the plaintiffs in this cause were engaged at the time litigation was instituted to conduct this litigation which speaks for itself.

3.

State whether you, personally, have ever made any contribution of any nature whatever for the repair, restoration, upkeep or maintenance of the Civil War locomotive "General".

No.

4.

State whether you know, or have reason to believe that, any person or legal entity has made any contribution of any nature whatever for the upkeep, maintenance, repair or restoration of the "General".

This information is largely hearsay. However, the *Atlanta Journal* for August 2, 1907, in an article contrasting the treatment of the engine "Texas" by the State of Georgia with that of the engine "General" by the public of Chattanooga, stated as to the engine "General":

> "After the conclusion of the war friends and comrades of the raiders saw to it that the 'General', the prize for which eight brave men paid with their lives, was purchased and mounted upon a pedestal in Chattanooga where it now stands a monument to the courage and bravery of the Union soldiers who gave their lives in an effort to capture the locomotive."
>
> "A memorial association was formed to look after the inanimate old engine and it is daily wreathed in flowers, loving tributes from those who appreciate the sacrifices made by the raiders."

5.

Do you claim to have an interest in, or claim to represent any person, group or entity, claiming an interest in the "General" by virtue of an agreement or contract, either express or implied with the Louisville and Nashville Railroad, the Nashville, Chattanooga and St. Louis Railroad, the Western and Atlantic Railroad, or the State of Georgia.

There is no written contract of which plaintiffs are aware between the defendant and the City of Chattanooga or anyone on its behalf relative to the engine "General." As shown by the amended complaint in this cause, however, plaintiffs contend that an implied contract arose as a matter of law between the defendant railroad and its predecessor, the Nashville, Chattanooga and St. Louis Railroad on the one hand, and the City of Chattanooga and the public of the community on the other, by reason of the offer and representations of the railroad, seeking public interest and favor, with resulting economic benefit to the railroad, that the "General" would be kept permanently in Chattanooga as a monument to the valor of the past. The City of Chattanooga and the citizens of the community accepted this voluntary offer on the part of the railroad and took the old engine to their hearts, made it a part of the seal of the City of Chattanooga, and widely publicized the "General" as a tourist attraction in the area, all to the substantial economic benefit of the railroad by reason of the special advertising and good will involved directly to it. As a part of this implied contract, as a matter of law, the defendant railroad is presumed to have agreed to take the necessary steps to enable it to carry out its resulting obligation to the City of Chattanooga and the citizens of the community, by satisfying its lease contract obligation with the State of Georgia by making a cash payment or delivering other railroad equipment to the State of Georgia at the

end of the current lease, in lieu of a return of the "General" as such, an alternative obligation available to the railroad which the railroad can perform at nominal cost.

G. State the name, address and telephone number of any person whom you believe to be the legal custodian of any document, instrument or other writing not heretofore described, which writing you believe evidences, or tends to evidence, the making of such an agreement as described in paragraph 3 above.

The defendant railroad may well have in its custody documents similar to those already above described upon which plaintiffs rely as above set forth. The railroad is being requested to produce all such documents. The plaintiffs are not in possession of any documents other than those described above which would give rise to the implied contract aforesaid.

H. Describe with particularity any action taken by an official of the Louisville and Nashville Railroad, the Nashville, Chattanooga and St. Louis Railroad, the Western and Atlantic Railroad or the State of Georgia, by which action the City of Chattanooga, its citizens or any other group claiming to have an interest of any nature whatever in the "General" by virtue of a contract or agreement was assured that the "General" would be returned to Chattanooga, Tennessee, to remain there perpetually, following its removal from such City on or about June 6, 1961.

See answer to 2Q above.

I. Each and every action you, personally, have taken, or which you believe to have been taken by someone else, by which action you have notified in any manner whatever, any official of the Louisville and Nashville Railroad, the Nashville, Chattanooga and St. Louis Railroad, the Western and Atlantic Rail-

road or the State of Georgia, of any claim of an interest in or to the "General" or by which you protested any action of the Louisville and Nashville Railroad Company, the Western and Atlantic Railroad Company, the State of Georgia, the authority for which action is derived from a contract or agreement requiring or promising that the "General" will perpetually remain in Chattanooga, Tennessee.

The filing of this and related litigation seeking to enforce the solemn promise made primarily by the Nashville, Chattanooga & St. Louis Railway that the engine "General" would remain in Chattanooga permanently as a memorial to the valor of the past. Having had the promise of the President of the Louisville & Nashville Railroad, that the "General" would be returned to Chattanooga (See answer 2Q above) as exemplified by the railroad jointly sponsoring a "Welcome *Home*" program at Chattanooga at the conclusion of the centennial of the Great Locomotive Chase on April 14, 1962, in Chattanooga, there was no prior reason to believe the railroad would not honor its solemn promise to the City of Chattanooga and the citizens of this community in return for their patronage and good will first made over 50 years ago, that the "General" would remain permanently in this community. When it was learned however, that the L & N Railroad intended to attempt to place its own interest above the solemn promise of its predecessor, the Nashville, Chattanooga & St. Louis Railroad and was seeking to ignore the dedication in trust and implied contract aforesaid by granting the engine "General" to tourist interests in the State of Georgia, plaintiffs felt compelled to take the necessary steps on behalf of the City of Chattanooga and the citizens of this community to enforce said trust and implied contract and prevent this attempted gross breach by the railroad of its solemn obligation under the circumstances. This action resulted.

6.

Describe with particularity the circumstances surrounding your obtaining knowledge of your interest in the "General" including in but not limiting your description to the following:

A. The date upon which you acquired such information;

General understanding prior to September 11, 1967, that the engine "General" belonged to this community and more specific knowledge immediately thereafter based upon historical research made at that time as evidenced by the documents compiled in the list of documents submitted to the defendant on or about September 10, 1968, by plaintiffs.

B. The name, address and telephone number of the person communicating such information to you;

The specific data was communicated orally and by copies of pleadings by the attorneys of record for the plaintiffs in this cause.

C. The manner in which said information was communicated to you and, if by writing, state further:

a) The title of the writing;

b) The name, title, employer of, address and telephone number of the person executing such writing;

See 6B above.

The City of Chattanooga, Tennessee
By: /s/ Ralph Kelley
Mayor

/s/ Donald W. Hayden
/s/ E. R. Pickett
/s/ Felix Miller, Jr.
/s/ Fred Rothberger, Jr.

MOTION TO DISMISS COMPLAINT OR FOR SUMMARY JUDGMENT.

(Filed October 4, 1968.)

Comes the defendant, Louisville & Nashville Railroad Company, by its attorneys, and moves the Court under Rule 12(b)(6), Federal Rules of Civil Procedure, to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted, or in the alternative, to grant summary judgment for the defendant under Rule 56, Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact, as more particularly appears from the affidavits of P. R. Olgiati, Thomas J. Hale, Marschal D. Rothe and C. P. May, attached hereto as Exhibits "A," "B", "C" and "D" respectively, and from the plaintiffs' joint answer to the defendant's interrogatories; attached hereto as Exhibit "E", and from the defendant's answer to plaintiffs' requests for admissions, attached hereto as Exhibit "F".

Spears, Moore, Rebman & Williams
By: /s/ W. D. Spears
Attorneys for Defendant
350 Maclellan Building
Chattanooga, Tennessee 37402

Exhibit "A."

AFFIDAVIT.

(Filed October 4, 1968.)

STATE OF TENNESSEE,
COUNTY OF HAMILTON.

P. R. Olgiati, being first duly sworn, deposes and says as follows:

That in July, 1946, he was elected to the office of Commissioner of Streets and Sewers of the City of Chattanooga, Tennessee; that he held that office four years and eight months; that in 1951 he was elected Mayor of the City of Chattanooga, Tennessee, and served as Mayor of Chattanooga, Tennessee until 1963. Your affiant states that during this period of time he knew that the engine known as "The General" was located at the Union Station and that it was placed on the Union Station grounds which is the property of the Nashville, Chattanooga & St. Louis Railway and its successor, the Louisville & Nashville Railroad Company, and that from time to time the engine was taken out to be repaired or to be taken to various historical events where it was requested as an exhibit. Your affiant states that never at any time while he was serving as Commissioner or Mayor of the City of Chattanooga, did he know of any claim made by the City of Chattanooga that was adverse to the ownership or control of the engine known as "The General" by the Nashville, Chattanooga & St. Louis Railway, or its successor, The Louisville & Nashville Railroad Company. Your affiant says that on one occasion around 1961 when "The General" was taken out of the Union Station for a period of time he was advised by the officials of the Railroad that upon completion of the exhibition to which it was being taken,

it would be returned to Chattanooga. Your affiant states that he considered this information to be simply a courtesy to the City of Chattanooga as he knew of no claim of ownership that the City had to "The General." Your affiant would further state that during the time he was in office he never knew of any claim by the City of Chattanooga that "The General" was not the personal property of the Nashville, Chattanooga & St. Louis Railway, or its successor, the Louisville & Nashville Railroad Company.

/s/ P. R. Olgiati
P. R. Olgiati

Sworn to and subscribed before me this 30th day of September, 1968.

/s/ illegible
Notary Public

My Commission Expires January 9, 1972.

Exhibit "B."

AFFIDAVIT.

(Filed October 4, 1968.)

STATE OF TENNESSEE,
COUNTY OF HAMILTON.

Thomas J. Hale, being first duly sworn, deposes and says as follows:

That he is now a retired employee of the Louisville & Nashville Railroad Company; that prior to the time of his employment with the Louisville & Nashville Railroad Company, he was employed by the Nashville, Chattanooga & St. Louis Railway, which was later merged with the Louisville & Nashville Railroad Company; that he came to Chattanooga as an employee of the Nashville, Chattanooga & St. Louis Railway in May, 1919 and that he served in various capacities from May, 1919 until February, 1937, at which time he was transferred from Chattanooga and moved to Nashville in the employ of the Nashville, Chattanooga & St. Louis Railway; that in December, 1942 he was transferred to Chattanooga as assistant superintendent, and was later promoted to Superintendent of the Chattanooga Division on January 1, 1952, and was retired on September 16, 1963.

Your affiant states that during the time he was with the Chattanooga Division of the Nashville, Chattanooga & St. Louis Railway and later the Louisville and Nashville Railroad Company, the locomotive known as "The General" was located in the Union Station in Chattanooga, Tennessee; that it was placed on exhibition there and had been there prior to the time he came with the Railroad and that it stayed in this location in the Union Station behind an iron fence, placed on view for the passengers and many

of the general public who wanted to see it there at the Union Station. Your affiant states that to his knowledge this engine was always under the supervision and control of the Railroad itself; that whenever it was moved and taken to other cities to be placed on exhibition, this was done by the employees of the Railroad; that whenever it was repaired, it was done by employees of the Railroad and at the sole expense of the Railroad; that there were no contributions made by anyone to the upkeep or maintenance of "The General" to his knowledge, and if there was any claim by any other parties as to the ownership of "The General" during this time, he did not know of it or hear of it.

/s/ Thomas J. Hale
Thomas J. Hale

Sworn to and subscribed before me this 27th day of September, 1968.

/s/ Frances B. Hamilton
Notary Public

(Seal)

My Commission expires: April 9, 1972.

Exhibit "C."

AFFIDAVIT.

(Filed October 4, 1968.)

STATE OF FLORIDA,
COUNTY OF DADE.

Marschal D. Rothe, being first duly sworn, deposes and says as follows:

That he is a former employee of the Nashville, Chattanooga & St. Louis Railway, which was later merged with the Louisville & Nashville Railroad Company; that he entered the employ of the Nashville, Chattanooga & St. Louis Railway in Chattanooga in May, 1919; that he started as a file clerk with the Railroad and later was promoted and finally ended his career as Assistant Engineer; that he was in the employ of the Railroad continuously from 1919 until his retirement in September, 1964; that to his knowledge during this period of time the engine known as "The General" was on exhibition in the Union Station which was the property of the Railroad; that the engine was behind an iron fence and with the exception of the few times when it was taken out by the Railroad and put on exhibition in different parts of the United States, it stayed there on exhibition at the Union Station. Your affiant states that to his knowledge the maintenance, upkeep and repairs on "The General" were made at the sole expense of the Railroad; that to his knowledge no person or group of citizens ever made a contribution to the upkeep or repair of "The General"; that to his knowledge no claim was ever made during that period of time intimating in any way that "The General" was not the property of the Railroad to be disposed of as it saw fit. Your affiant states that he knows of his knowl-

edge that all the repairs and upkeep on "The General" were made at the sole expense of the Railroad.

/s/ Marschal D. Rothe
Marschal D. Rothe

Sworn to and subscribed before me this 2nd day of October, 1968.

/s/ Margaret C. Hopkins
Notary Public

(Seal)

My Commission expires: March 29, 1972.

Exhibit "D."

AFFIDAVIT.

(Filed October 4, 1968.)

STATE OF TENNESSEE,
COUNTY OF HAMILTON:

C. T. May, being first duly sworn, deposes and says as follows:

That he is the Ticket Agent for the Louisville & Nashville Railroad Company at Union Station in Chattanooga, Tennessee; that he has been in the employ of the Nashville, Chattanooga & St. Louis Railway, and subsequently with the Louisville & Nashville Railroad Company for more than thirty years (30), working at all times in the ticket office at Union Station in Chattanooga. As part of his duties with the Nashville, Chattanooga and St. Louis Railway, and subsequently with the Louisville & Nashville

Railroad Company, your affiant was and is in charge of all moneys collected at Union Station. Your affiant states that to his knowledge during the more than thirty continuous years that he has been at Union Station, no person or group of citizens, other than the persons with the N. C. & St. L. and the L & N RR, made, or is making, any contributions to the upkeep or the repair of "The General." Your affiant further states that during his years at Union Station no one has ever made a claim at any time that "The General" was the property of anyone other than the Nashville, Chattanooga & St. Louis Railway and its successor, the Louisville & Nashville Railroad Company.

/s/ C. T. May
C. T. May

Sworn to and subscribed before me this 4th day of October, 1968.

/s/ Frances B. Hamilton
Notary Public

(Seal)

My commission expires: April 9, 1972.

AFFIDAVIT IN OPPOSITION TO MOTION FOR NEW TRIAL.

(Filed February 24, 1968.)

Comes the defendant Louisville & Nashville Railroad Company, and in opposition to the motion for new trial filed by the plaintiffs, attaches hereto the affidavit of Clair W. Langmaid, Jr.

Spears, Moore, Rebman & William
By: W. D. Spears
Attorneys for Defendant
350 Maclellan Building
Chattanooga, Tennessee

Affidavit.

COMMONWEALTH OF KENTUCKY,
COUNTY OF JEFFERSON:

Clair W. Langmaid, Jr., being first duly sworn, deposes and says that:

He is the Assistant to the Vice President-Law of the Louisville and Nashville Railroad Company, is admitted to practice law in both the states of Kentucky and Ohio, and has been assigned to assist as house counsel in the litigation between the Louisville and Nashville Railroad Company and the City of Chattanooga, Tennessee, involving the Civil War locomotive "General."

One of the first steps taken by affiant shortly after the commencement of this litigation was to make a thorough search of the Company's files and archives to determine what documents or other information might be available relating to the "General." This search was conducted, in part, personally by him or by others at his request and under his supervision. He discovered that the records

relating to the original rolling stock of the Western and Atlantic Railroad, including the "General," maintained by the Nashville, Chattanooga and St. Louis Railway, which had leased the former railroad and which was in 1957 merged into the Louisville and Nashville Railroad Company, had, for the most part, been destroyed shortly after the merger.

Those documents that affiant was able to discover relating to the "General" were identical to those which the City of Chattanooga had filed with the Court during the course of the litigation. In fact, the City was able to produce many documents that the affiant was unable to discover in his search mentioned above.

Since the Louisville and Nashville Railroad Company did not acquire any interest in the "General" until 1957, when the Nashville, Chattanooga and St. Louis Railway was merged into it, the Louisville and Nashville Railroad Company's own records did not contain anything relating to the "General" prior to 1957.

/s/ Clair W. Langmaid, Jr.

Subscribed and sworn to before me the 15th day of February, 1969.

/s/ F. R. Wilton
Notary Public,
Jefferson County, Kentucky

My Commission expires: December 5, 1969.